

**REDACTED – PUBLIC VERSION**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: GENERIC PHARMACEUTICALS PRICING ANTITRUST LITIGATION	MDL 2724 16-MD-2724
THIS DOCUMENT RELATES TO: <i>ALL ACTIONS</i>	HON. CYNTHIA M. RUFE

**CERTAIN DEFENDANTS' SUBMISSION PURSUANT TO PTO NO. 157  
CONCERNING REVISED BELLWETHER SELECTION**

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The undersigned Defendants (“Defendants”) respectfully submit this memorandum pursuant to Pretrial Orders Nos. 154 and 157, and the Court’s memorandum opinion of February 9, 2021 (the “February 9 Opinion”), granting Defendant Teva Pharmaceuticals USA, Inc.’s (“Teva”) motion for reconsideration and vacating Pretrial Order No. 132 on the selection of bellwether cases.<sup>1</sup>

**PRELIMINARY STATEMENT**

In its February 9, 2021 Opinion, the Court stated that the State Plaintiffs’ Heritage-Centric action “is an appropriate choice for a bellwether.” (February 9 Opinion at 4.) The undersigned Defendants agree.

The State Plaintiffs’ Heritage-Centric action (the “Heritage-Centric action”) is the only choice of the three so-called “overarching” cases filed by the State Plaintiffs to effectively and efficiently advance this litigation and provide guidance for other cases in this MDL. That is because the Heritage-Centric action:

- involves a substantial (but more manageable) number of products—critically, *none* of which are products included in the Teva Indictment (defined below), whereas both the State Plaintiffs’ Teva-Centric action and the action the State Plaintiffs filed on June 10, 2020 (the “Dermatology action”)<sup>2</sup> involve indictment products.<sup>3</sup>

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<sup>1</sup> Nothing herein should be construed as a waiver of the right of any Defendant to seek remand in respect of any case transferred into this Court for consolidated pre-trial proceedings under 28 U. S. C. § 1407(a).

<sup>2</sup> *The State of Connecticut, et al. v. Sandoz, Inc., et al.*, Civil Action No. 2:20-cv-03539 (E.D. Pa. June 10, 2020), ECF No. 1.

<sup>3</sup> Accordingly, for similar reasons as those at the center of the Court’s February 9 Opinion removing the Teva-Centric action as a bellwether, the Dermatology action is inappropriate as a bellwether case.

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- comprises a representative mix of large and small corporate Defendants as well as individual Defendants—none of the individual Defendants is indicted [REDACTED]  
[REDACTED]  
[REDACTED]; and
- is by far the most procedurally advanced of the State Plaintiffs’ actions as motions to dismiss have been briefed and in certain instances decided, and Defendants have substantially completed production of documents and data concerning the claims in that action<sup>4</sup>—none of those material advancements can be said of the Dermatology action.<sup>5</sup>

Finally, Heritage Pharmaceuticals, Inc. (“Heritage”)—the focus of the Heritage-Centric action—favors moving forward with the Heritage-Centric action and does not face the same prejudice issues raised in Teva’s motion for reconsideration.

For these reasons, and as explained further below, the undersigned Defendants respectfully request that the Court confirm its decision that the Heritage-Centric action is the appropriate choice as a bellwether.<sup>6</sup>

**BACKGROUND**

On July 13, 2020, the Court entered PTO No. 132, which selected as bellwethers the State Plaintiffs’ Teva-Centric action, as well as the DPPs’ and EPPs’ Clobetasol, Clomipramine and Pravastatin individual drug cases. Thereafter, on August 25, 2020, Teva was charged in a

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<sup>4</sup> State Plaintiffs have not completed their productions for any of their cases.

<sup>5</sup> The parties are engaging in good-faith negotiations regarding the scope of document production in the Dermatology action and anticipate completing those negotiations shortly.

<sup>6</sup> This statement does not address the DPP and EPP Clomipramine and Clobetasol actions that were identified as appropriate bellwethers but not specifically addressed in the Court’s February 9 Opinion. Defendants and counsel for DPPs and EPPs have since met and conferred and were able to reach agreement as to the DPP and EPP bellwethers, as reflected in a joint stipulation submitted to the Court earlier today.

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three-count indictment brought by the DOJ Antitrust Division. *See United States v. Teva Pharmaceuticals, USA, Inc. and Glenmark Pharmaceuticals Inc., USA*, No. 20-CR-00200-RBS, ECF 28 (E.D. Pa. Aug. 25, 2020) (the “Teva Indictment”).<sup>7</sup> The Teva Indictment refers to the following 14 products: (1) Carbamazepine Tablets; (2) Carbamazepine Chews; (3) Clotrimazole Topical Solution; (4) Etodolac IR; (5) Etodolac ER; (6) Fluocinonide Cream; (7) Fluocinonide Emollient Cream; (8) Fluocinonide Gel; (9) Fluocinonide Ointment; (10) Nadolol; (11) Pravastatin; (12) Temozolomide; (13) Tobramycin; and (14) Warfarin. Significantly, *none* of these indictment products are at issue in the Heritage-Centric action. By contrast, certain of these indictment products are at issue in both the State Plaintiffs’ Teva-Centric and Dermatology “overarching conspiracy” actions.

On November 3, 2020, Teva moved for reconsideration of the Court’s bellwether selection on the grounds that the criminal proceedings would impede progress of the Teva-Centric and Pravastatin cases, and as a result, the MDL in general, and would prejudice Teva. Following oral argument, on February 9, 2021, the Court issued a memorandum and order granting the motion for reconsideration, vacating PTO No. 132, and noting that the Heritage-Centric case would provide an “appropriate choice for a bellwether.” (February 9 Opinion at 4.)

### **ARGUMENT**

#### **I. The Heritage-Centric Action Is the Only Appropriate State Plaintiff Bellwether**

##### *(a) The Heritage-Centric Action Will Be Least Impacted by the Pending Criminal Proceedings*

In its February 9, 2021 Opinion, the Court reconsidered its selection of the Pravastatin

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<sup>7</sup> Defendant Glenmark Pharmaceuticals Inc., USA (“Glenmark”) was charged with antitrust violations with respect to Pravastatin via information on June 30, 2020 and indicted on July 14, 2020. The DOJ filed a Second Superseding Indictment on August 25, 2020, which also charged Teva with antitrust violations with respect to Pravastatin and other drugs.

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and Teva-Centric actions because the DOJ's criminal proceedings raised "due process concerns" given the "risk of delay and of scheduling conflicts with the criminal case." (February 9 Opinion at 3-4.) Moving forward with the Heritage-Centric action will not raise these potential prejudice and due process concerns. First, that case involves none of the 14 products included in the Teva Indictment (or any other pending indictment). By contrast, three of these products are at issue in the Dermatology action.

Second, no individual Defendant in the Heritage-Centric action has been indicted and so proceeding with the Heritage-Centric action does not present the same issues as the Teva-Centric action. (See Defs. Objection to Marion Bellwether R&R 11 n.20, ECF No. 1296; Defs. Reply ISO Objection to Marion Bellwether R&R 11, ECF No. 1353.) By contrast, the Dermatology action concerns an individual Defendant who has been indicted. [REDACTED]

[REDACTED], thereby reducing any delay that will be caused [REDACTED]. (See Defs. Objection to Marion R&R 3, ECF No. 1296; Defs. Reply ISO Objection to Marion Bellwether R&R 7, ECF No. 1353; Defs. Supplemental Submission ISO Objection to Marion Bellwether R&R 3, ECF No. 1384.) And, while Teva is a Defendant in the Heritage-Centric action, it is not a central focus. (See February 9 Opinion at 3.) There are also fewer current and former Teva employees who are identified in that complaint, as compared with the State Plaintiffs' other two complaints.

(b) *The Heritage-Centric Action Involves a More Manageable Number of Products and Includes Some of the Largest Defendants in the MDL*

Litigation concerning the 15 products in the Heritage-Centric action will be sufficient to test the State Plaintiffs' "overarching conspiracy" theory, without having so many as to render the litigation unwieldy and inefficient. The same cannot be said for the Dermatology action, which involves 83 products.

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The Heritage-Centric action also involves an appropriate mix of large and small corporate Defendants, as well as two individual defendants. And among the manufacturer Defendants in that case are some of the largest in the MDL each of which would thus have a significant stake in the outcome of the bellwether case. (*See* Pls. Opp’n to Teva’s Motion for Reconsideration, ECF No. 1603, at 13 (“[I]t remains essential that the largest and most representative Plaintiffs and Defendants have significant stakes in the bellwethers.”).)

(c) *The Heritage-Centric Action is the Most Procedurally Advanced*

The Heritage-Centric action has been at the center of this MDL for almost three years since the State Plaintiffs filed their consolidated amended complaint on June 15, 2018. As a result, it is significantly more advanced than any case filed by the State Plaintiffs.

The Court already ruled on a joint motion to dismiss the overarching conspiracy claims in the Heritage-Centric action, and the remaining motions to dismiss are fully briefed. In addition, Defendants substantially completed their productions of documents and transactional data relevant to the Heritage-Centric action. In contrast, Defendants have not yet had the opportunity to test the Dermatology complaint’s allegations in motions to dismiss, and Defendants’ productions and certain negotiations about the scope of the discovery related to the Dermatology complaint are ongoing. Thus, the selection of the Dermatology action as a bellwether would set the case back many months.

(d) *Heritage Favors the Heritage-Centric Action*

Heritage continues to advocate for the selection of the State Plaintiffs’ Heritage-Centric action as a bellwether. (*See generally* Heritage Objection to Marion 3d R&R, ECF No. 1294-2.)

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Heritage does so despite having entered into a deferred prosecution agreement with respect to one product that is a significant part of the Heritage-Centric action.

**CONCLUSION**

For the reasons set forth above, the undersigned Defendants respectfully request that the Court select the Heritage-Centric case as a bellwether. As the Court noted in granting Teva's reconsideration motion, the Heritage-Centric action is an appropriate bellwether choice, given (among other things) unlike the Dermatology action, it does not concern any of the products referred to in the Teva Indictment and does not name any individual Defendant who has been criminally indicted.



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Dated: March 1, 2021

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 1, 2021, a copy of the foregoing Certain Defendants' Submission Pursuant to PTO No. 157 Concerning Revised Bellwether Selection was served on counsel of record via the Court's CM/ECF system.

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